Supreme Court, U.S.
FILED
AUG 02 1993

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

David R. Pheils, Petitioner

vs

City of Perrysburg, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF WOOD COUNTY, OHIO

PETITION FOR WRIT OF CERTIORARI

DAVID R. PHEILS
Pro se

410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177

THOMAS P. KURT

Counsel of Record
Crandall, Pheils & Wisniewski
410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177

22 pp

QUESTION PRESENTED FOR REVIEW

Whether a penal statute consisting of two subsections is so vague as to violate due process, where the first subsection expressly approves conduct which the second subsection expressly prohibits.

TABLE OF CONTENTS

Question Presented for Review	i
Table of Authorities	iv
Opinions Below	v
Jurisdictional Statement	vi
Constitutional Provisions and Statutes	vii
Statement of the Case	1
Argument for Allowance of the Writ	3
Appendix:	
Opinion and Judgment Sought to be Reviewed	7

TABLE OF AUTHORITIES

Cases:

United States v. Harris, 347 U.S. 612, (1954) 3

Kolender v. Lawson, 461 U.S. 352,(1983) 3

State and Municipal Statutes:

Section 4511.62, Ohio Revised Code 4

Section 432.31, Perrysburg Municipal Code 4

Constitutional Provisions:

United States Constitution, Amendment V 5

OPINIONS BELOW

The judgment and opinion sought to be reviewed was unreported and may be cited as *City of Perrysburg v. Pheils*, No. 92WD035, (Wood County Court of Appeals, Ohio, December 30, 1992).

The decision of the Ohio Supreme Court denying discretionary review reported in the table at 66 Ohio St.3d 1473 (1993).

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was announced and filed on December 30, 1993.

The decision of the Ohio Supreme Court denying discretionary review was announced and filed on May 5, 1993.

Jurisdiction of this Court to review the judgment of the court below by writ of certiorari is conferred by 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Effective 1791)

Section 432.31, Perrysburg Municipal Code:

(A) Whenever any person driving a vehicle or trackless trolley approaches a railroad grade crossing under any of the circumstances stated in this section, he shall stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:

(1) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;

(2) A crossing gate is lowered;

(3) A human flagman gives or continues to give a signal of the approach or passage of a train;

(4) A train approaching within approximately one thousand five hundred feet of the highway crossing emits a signal audible from that distance and the train, by reason of its speed or nearness to the crossing, is an immediate hazard;

(5) An approaching train is plainly visible and is in hazardous proximity to the crossing.

(B) No person shall drive any vehicle through, around, or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed.

(Identical to Ohio Revised Code sec. 4511.62)

STATEMENT OF THE CASE

On July 22, 1992, petitioner was travelling on Indiana Avenue in the City of Perrysburg. His route of travel required him to cross a rail line which intersected Indiana Avenue. A set of warning lights was flashing, and an automatic gate had been lowered in front of the crossing. However, no train was observable on the single track.

As petitioner continued to approach the crossing, he was able to observe further down the rail line, and still did not see any train. Two vehicles were ahead of petitioner when he stopped at the crossing, and petitioner then pulled abreast of them in order to have yet a better view of the crossing. From this vantage, petitioner could now observe an engine and cars some two to three hundred yards northeast of the crossing, approaching at a very slow rate of speed. According to the train's brakeman, the train was proceeding at 5 miles per hour or less.

After ascertaining that he could safely cross the rail line, petitioner drove around the gate.

A few seconds later, a municipal police officer followed petitioner around the gate. The officer then cited petitioner for violating Perrysburg's municipal ordinance which regulates the circumstances under which motorists may proceed through rail crossings.

As will be explained in this petition, the municipal ordinance in question contains two subparts. Subpart 'B' forbids a motorist from entering a rail crossing at any time that the automatic gate has been lowered. Subpart 'A' permits a motorist to enter a rail crossing *when the crossing gate is lowered*, if the motorist can safely do so.

The case against petitioner proceeded to trial, during which petitioner argued to the trial court that the ordinance under which he was charged is unconstitutionally vague.

Petitioner was convicted of violating subpart 'B' of the ordinance. On appeal, to the Wood County Court of Appeals, petitioner again argued that the municipal ordinance violated the fourteenth amendment to the United States Constitution, in that the language of the ordinance fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.

The Court of Appeals affirmed petitioner's conviction in a divided opinion.

Petitioner sought discretionary review in the Ohio Supreme Court, again challenging the constitutionality of the ordinance. The Ohio Supreme Court denied review.

This petition for writ of certiorari to the Ohio Supreme Court follows.

ARGUMENT FOR ALLOWANCE OF THE WRIT

In 1954, this Court concisely stated the requirement that penal statutes be sufficiently definite to give notice that particular behavior is criminal. This Court stated:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

United States v. Harris, 347 U.S. 612, 617 (1954)

Additionally, a penal statute must be sufficiently specific so as not to "encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The municipal ordinance upon which petitioner was convicted fails both the *Harris* and *Kolender* tests set forth above. The two subparts which comprise the ordinance are in material conflict with each other. Subpart 'A' *permits* a motorist to proceed through a rail crossing *when a crossing gate has been lowered* and he or she can safely do so. Subpart 'B' *forbids* a motorist to proceed into a rail crossing, no matter what the circumstances, *when the crossing gate has been lowered*.

When the conditions described in subparts 'B' and 'A' both exist, the citizen cannot determine whether his conduct is *permitted* or *forbidden*. By forbidding in one subsection behavior which has express approval in another subsection, the ordinance is vague and overbroad, and subject to the mischief of unfettered prosecutorial discretion.

In petitioner's case, this dilemma was real and not merely potential. When he approached the rail crossing on Indiana Avenue, the automatic gate had been lowered, yet it

was plain that he could safely proceed.[1]

Petitioner's behavior was permitted by one subpart and forbidden by the other.

To date, the resolution of this conflict has been in the sole discretion of the police officer and the prosecutor. The lower courts have deferred to the initial decisions of the police officer and the prosecutor to apply subpart 'B' but not subpart 'A'.

As illustrated in the cases cited above, an ordinance which is so vague as to allow such discretion is void and unconstitutional.

Additionally, the instant case presents a novel and important issue which has not to date been resolved by this court: whether a penal statute which purports to both permit and prohibit the same conduct is void for vagueness *on its face*. To petitioner's knowledge, neither this or any other court has resolved this issue.

The dilemma faced by one in petitioner's circumstances is faced by every citizen of Ohio who comes upon a rail crossing.[2] More importantly, any citizen of this country could be affected by a penal statute which is self-contradictory as is the municipal ordinance directly at issue here. Doubts as to criminal culpability should not to be resolved by police and/or prosecutorial discretion. Rather,

---

[1] A municipal police officer also proceeded through the crossing, *after petitioner*, and testified that he was able to do so safely.

[2] Perrysburg Municipal Code section 432.31 is identical to Ohio Revised Code section 4511.62.

culpability must be clearly spelled out in the relevant penal statute itself. The appropriate remedy is not to allow unfettered discretion in the application of one subpart or the other. This Court should grant the writ of certiorari and affirm the principle that penal statutes must give fair notice to citizens who wish to be law abiding, by declaring the ordinance at issue to be violative of the fifth amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the court below should be reversed.

Respectfully submitted,

DAVID R. PHEILS
Pro se

410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177

THOMAS P. KURT
Counsel of Record
Crandall, Pheils & Wisniewski
410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177

APPENDIX

City of Perrysburg, Appellee
v.
David R. Pheils, Jr., Appellant

Court of Appeals No. 92WD035.
6th District Court of Appeals of Ohio, Wood County.
Decided on December 30, 1992.

Trial Court No. 92TRD638.

P. Martin Aubry, for appellee.

David R. Pheils, Jr., pro se.

DECISION

This case is an accelerated appeal from the March 17, 1992 judgment entry of the Perrysburg Municipal Court, which found appellant, David R. Pheils, Jr., guilty of violating Perrysburg Municipal Code Section 432.31, driving across a railroad crossing when warning lights and the gate were activated. On appeal, appellant asserts the following two assignments of error:

"I. THE TRIAL COURT ERRED IN REFUSING TO CONSTRUE [sec.] 432.31, P.M.C., AS A WHOLE AND STRICTLY AGAINST THE CITY RATHER THAN SOLELY SUBPART (b) WITHOUT CONSIDERATION OF SUCH SECTION AS A WHOLE.

"II. THE TRIAL COURT ERRED BECAUSE [sec.] 432.31, P.M.C., AS CONSTRUED BY THE TRIAL

COURT, IS VOID FOR VAGUENESS THEREBY DENYING THE APPELLANT DUE PROCESS REASONABLE NOTICE."

In his first assignment of error, appellant argues that the trial court erred in its interpretation of Perrysburg Municipal Code Sect 432.31. In his second assignment of error, appellant argues that Perrysburg Municipal Code 432.31 is void for vagueness. This second assignment of error is raised for the first time on appeal. Therefore it cannot be considered by this court. Egan v. Natl. Distillers & Chemical Corp. (1986), 25 Ohio St.3d 176, syllabus. Accordingly, appellant's second assignment of error is not well-taken.

Perrysburg Municipal Code Section 432.31 reads as follows:

"432.31 DRIVING ACROSS GRADE CROSSINGS.

"(a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, he shall stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:

"(1) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;

"(2) A crossing gate is lowered;

"(3) A human flagman gives or continues to give a signal of the approach or passage of a train;

"(4) A train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from that distance and the train, by reason of its speed or nearness to the crossing, is an immediate hazard; or

"(5) An approaching train is plainly visible and is in hazardous proximity to the crossing.

(b) No person shall drive any vehicle through, around or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed."

Appellant argues that the following strict construction of this criminal statute should be made: Subsection (a)(2) provides an exception to the prohibition under subsection (b); that is that a motorist may proceed around a lowered grade crossing gate if he can do so safely. The trial court refused to accept this construction, holding that under R.C. 4511.62(B) a motorist is absolutely prohibited from proceeding around the gate.

The record shows that appellant was charged with violating Perrysburg Municipal Code 432.31. On February 14, 1992, the city filed a motion to amend the charge to a violation of Perrysburg Municipal Code 432.31(b). At trial, the city renewed its motion. Over the defense's objection, the court granted the city's motion. Appellant was convicted of violating Perrysburg Municipal Code 432.31(b).

Perrysburg Municipal Code 432.31 is identical to R.C. 4511.62.

It is well settled law that "[w]here there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes

precedence." State v. Volpe (1988), 38 Ohio St.3d 191, paragraph one of the syllabus.

Perrysburg Municipal Code 432.31(a), as well as R.C. 4511.62(A) prohibits drivers from proceeding over a railroad crossing when "[A] crossing gate is lowered *** until he can do so safely."(fn1) Perrysburg Municipal Code 432.31(b) as well as R.C. 4511.63(B) prohibits drivers from proceeding "through, around or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed." Thus, Perrysburg Municipal Code 432.3 1(b) specifically prohibits the action appellant was convicted of without exception. Appellant's contention that Perrysburg Municipal Code 432.31(a) and (b) must be construed as a whole is without merit. Perrysburg Municipal Code 432.31(b), the more specific provision as to the law on railroad crossing gates, takes precedence. Accordingly, appellant's first assignment of error is found not well-taken.

On consideration whereof, the court finds that substantial justice was been done the party complaining, and the judgment of the Perrysburg Municipal Court, is affirmed. Costs to appellant.

Resnick, J. and Sherck, J. concur. Handwork, J., dissents.

HANDWORK, J.

I would conclude that the trial court's interpretation of Perrysburg Municipal Code 432.31(b) is erroneous and find the ordinance must be read as a whole. The only logical interpretation of the ordinance is that a motorist must stop when a crossing gate is lowered and may not proceed unless it

is safe to do so. The trial court should have made a determination, as trier of fact, that appellant could either safely ignore the crossing gate or he could not.

Footnotes:

1 This does not mean that we construe 432.31(a) or R.C. 4511.62(A) as necessarily permissive. The words "until" and "unless" are inapposite and appellant's construction clearly substitutes the word unless for until.

City of Perrysburg, Appellee
v.
David R. Pheils, Jr., Appellant

[On Reconsideration]

Court of Appeals No. 92WD035.
6th District Court of Appeals of Ohio, Wood County.
Decided on January 25, 1993.

Trial Court No. 92TRD638.

P. Martin Aubry, for appellee.

David R. Pheils, Jr., pro se.

DECISION

This matter is before the court on appellant, David R. Pheils' motion for reconsideration of our decision dated December 30, 1992.

Appellant argued in his second assignment of error that Perrysburg Municipal Code section 432.31 was void for vagueness. This court found the assignment of error not well-taken on the basis that the issue was not raised in the trial court and was therefore waived. In his motion for reconsideration, appellant has cited the specific page in the transcript where he raised the constitutional issue of vagueness. We agree with appellant that he did not waive the issue raised in his second assignment of error, and our initial reason for denying the assignment of error was wrong.

However, this does not change our original disposition of appellant's second assignment of error. Appellant was convicted of violating Perrysburg Municipal Code section

432.31(b) which states:
"No person shall drive any vehicle through, around or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed." We do not find this section of the Perrysburg Municipal Code, the second upon which appellant was convicted, to be unconstitutionally vague. Accordingly, appellant's motion for reconsideration is found not well-taken.

Resnick, J. and Sherck, J. concur. Handwork, J., dissents.